FILED
JUN 5 - 1995
OFFICE OF THE CLERK

No. 94-1669

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1994

ROBERT BRACE AND ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF OF THE ADIRONDACK BLUELINE CONFEDERATION, ADIRONDACK SOLIDARITY ALLIANCE, ALLEGHENY HARDWOOD UTILIZATION GROUP, ALLIANCE FOR AMERICA, AMERICAN ENVIRONMENTAL FOUNDATION, AS *AMICI CURIAE** IN SUPPORT OF PETITIONER

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BRIEF *AMICI CURIAE* OF
AMERICAN HOMEOWNERS FOUNDATION,
AMERICANS FOR TAX REFORM,
CITIZENS AGAINST REPRESSIVE ZONING,
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS,
CITIZENS FOR PRIVATE PROPERTY RIGHTS,
CITIZENS FOR RESPONSIBLE ZONING AND
LANDOWNER RIGHTS, INC.,
GORGE RESOURCE COALITION,
HARDWOOD LUMBER MANUFACTURING ASSOCIATION
OF PENNSYLVANIA,
HILL COUNTRY LANDOWNERS ASSOCIATION,
ILLINOIS AGRI-WOMEN,
MAINE RIGHTS LEGAL FOUNDATION,
MOBILE COUNTY LANDOWNERS ASSOCIATION,
MOLALLA TIMBER ACTION COMMITTEE,
NEW HAMPSHIRE LANDOWNERS ASSOCIATION,
OREGONIANS IN ACTION LEGAL CENTER,
PENNSYLVANIA AGGREGATES AND
CONCRETE ASSOCIATION,
PENNSYLVANIA ASSOCIATION OF REALTORS,
PENNSYLVANIA COAL ASSOCIATION,
PENNSYLVANIA INDEPENDENT PETROLEUM PRODUCERS,
PENNSYLVANIA LANDOWNERS' ASSOCIATION,
PENNSYLVANIA MINING PROFESSIONALS,
PEOPLE FOR THE WEST! ACCORD CHAPTER,
PUTTING PEOPLE FIRST,
RIVERSIDE AND LANDOWNERS PROTECTION
COALITION, INC.,
RURAL LANDOWNERS MUTUAL ASSISTANCE
ASSOCIATION,
STOP TAKING OUR PROPERTY,
UNIFIED SPORTSMEN OF PENNSYLVANIA,
WESTERN MINING COUNCIL,
WESTERN TRADITIONS COALITION,
WINNING AMERICA'S RIGHTS, and
DEFENDERS OF PROPERTY RIGHTS.

QUESTIONS PRESENTED

I. Whether the "normal farming activity" exemption under Section 404(f) of the Clean Water Act must be construed in a manner consistent with the Fifth Amendment mandate that private property be protected?

II. Whether the Fifth Amendment requires government to compensate a property owner where government actions frustrate reasonable investment-backed expectations?

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AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Adirondack Blueline Confederation (Gloversville, NY) is a citizens' group working for the preservation of property rights, especially in the Adirondack Park of New York.
Adirondack Solidarity Alliance (Crown Point, NY) was created to respond to state legislation that would further regulate private property in the Adirondack region. Its four chapters educate the community about the importance of property rights, and offer assistance to residents who are having trouble complying with the Adirondack Planning Act.
Allegheny Hardwood Utilization Group, Inc. (Kane, PA) is a coalition of loggers, foresters, sawmills, related forest industries, allied organizations, businesses, and government agencies working together to educate and inform individuals in the promotion of the forestry industry within Pennsylvania. AHUG initiates and supports programs, discussion, and legislation to protect the hardwoods industry.
Alliance for America (Gloversville, NY) is a fifty-state network of over 500 independent, grassroots property rights organizations whose collective membership represents millions of individual property owners across the country. Alliance groups cover the full spectrum of property rights interests including farming, grazing, forestry, fishing, mining, recreation, energy, and animal welfare.
American Environmental Foundation, Inc. (Navarre, FL) believes that the environment can be protected without compromising constitutional protections of property rights. AEF's founder Ocie Mills and his son were imprisoned for twenty-one months for allegedly disturbing a wetland. A federal judge later ruled that the parcel of dry land may have been improperly designated as a wetland.

American Homeowners Foundation (Arlington, VA) is an education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF is dedicated to making home ownership possible for non-owners, helping homeowners in need, protecting home values and ownership tax incentives, and helping home purchasers make informed decisions.

American Loggers Solidarity (Forks, WA) is a broad-based organization comprised of individuals, small businesses, corporations, and elected officials at the city, county, and state levels in seven states. ALS believes that the sanctity of individual rights as provided in the United States Constitution must be protected by elected officials, bureaucracies, and the judicial system.

Americans for Tax Reform (Washington, DC) is a coalition of individuals, taxpayer groups, and businesses dedicated to the principle of a limited government. They are concerned with federal tax policy and oppose increased taxation.

Citizens Against Repressive Zoning (Haslett, MI) works to curb abuses of zoning practices in counties, cities, villages, towns, townships, and parishes.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide organization purposed to secure private property guarantees provided in the Bill of Rights. CCPR engages in public advocacy projects that foster an awareness of governmental programs that violate the United States Constitution by eroding private property rights.

Citizens for Private Property Rights, Inc. (Sullivan, MO) is a nonprofit, grassroots organization dedicated to the defense and preservation of property rights and constitutional rights in general.

Citizens for Responsible Zoning and Landowner Rights, Inc. (Maiden Rock, WI) is comprised of farmers, landowners and businesspeople. The organization provides a forum to educate and inform the government of its responsibility to protect both the environment and the constitutional rights of its citizens.

Environmental Conservation Organization (Hollow Rock, TN) is a national organization of landowners and landowner associations working to balance environmental protection with economic vitality. Its membership includes individuals, businesses, and over 600 local, regional, state, and national organizations that work at the grassroots level.

Gorge Resource Coalition (Odell, OR) is a coalition of over 100 organizations. Primarily concerned with regulations affecting the Columbia River Gorge area, it is active at the local, state, and national levels to support private property rights, environmental stewardship, and less regulation.

Hardwood Lumber Manufacturing Association of Pennsylvania (Lebanon, PA) is committed to ensuring the viability of the timber resource and timber and forest products industry of Pennsylvania in the interest of achieving a healthy environment, sustainable forest base, and strong economy.

Hill Country Landowners Association (Georgetown, TX) was formed in response to plans to designate a 30,000-acre endangered species habitat in the State of Texas. The Coalition opposes enlarging of the authority of unelected officials because they are not subject to voter approval and their decisions can be remedied only through litigation.

Illinois Agri-Women (LaMoille, IL) is an organization of farm and agri-businesswomen promoting a better understanding of agriculture and the family farm system. They promote agriculture for the benefit of the American people.

Maine Rights Legal Foundation (Lubec, ME) engages in litigation in support of the broad public interest of the citizens of Maine and across the nation in the support of the continuation of private property rights as guaranteed under the United States and Maine Constitutions.

Mobile County Landowners Association (Mobile, AL) is a volunteer-staffed organization representing the interests of private property owners in the county on issues ranging from local zoning to the Endangered Species Act. Members attend county commission meetings, monitor state legislation, and maintain ties with national property rights organizations.

Molalla Timber Action Committee (Molalla, OR) was organized to counter efforts to halt natural resource production on federal lands. MTAC believes that forests can be managed without destroying the ecosystem or the economy.

New Hampshire Landowners Association (Campton, NH) is a statewide organization founded to foster the conservation of natural resources in a manner consistent with constitutionally-guaranteed property rights. NHLA participates in legal action that affects the direct interest of its approximately 2,000 members or that broadly affects public policy.

Oregonians In Action Legal Center (Tigard, OR) is a nonpartisan, nonprofit public interest organization involved in litigation to protect the constitutional rights of landowners and counter excessive uses of regulation. OIA-LC successfully represented the plaintiff in the United States Supreme Court case of *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).

Pennsylvania Aggregates and Concrete Association (Harrisburg, PA) is a trade association with over 250 member companies. PACA represents the sand, gravel, quarry, cement, slag ready-mix and concrete industries in the state.

Pennsylvania Association of REALTORS (Harrisburg, PA) is a nonprofit association representing over 25,000 members. The vast majority of its members are licensed independent real estate brokers and salespeople. One of the association's objectives is to protect the right to own and use private property.

Pennsylvania Coal Association (Harrisburg, PA) represents forty-six major producers of bituminous coal and nearly 100 companies in allied industries. The primary goals of the PCA are to offer common sense alternatives to legislative and regulatory decisions that affect coal operations and to communicate the continuing value of the coal industry.

Pennsylvania Independent Petroleum Producers Association, Inc. (Seneca, PA) is a nonprofit corporation founded to influence current and future oil and gas regulation within Pennsylvania that erodes property rights.

Pennsylvania Landowners' Association (Waterford, PA) was formed to educate property owners about the threat to their property rights and personal freedom posed by increasingly intrusive regulations on land use, to generate public debate, and to develop and implement a strategy to restore reason and balance in environmental regulation.

Pennsylvania Mining Professionals (Harrisburg, PA) is a commonwealth-wide group of engineers, surveyors, chemists, hydrogeologists, biologists, chemists, soil scientists, and technicians dedicated to applying science and technology to resource recovery and environmental protection.

People for the West! ACCORD Chapter (Phoenix, AZ) is a grassroots organization created to support western communities against overreaching government. Its membership believes that people who own and depend on the land make the best stewards of the environment and that mankind has the ability to solve environmental problems through scientific means.

Putting People First (Helena, MT) is a nonprofit organization of citizens who believe in Western Civilization and support a return to common sense in man's relationship with nature and to his fellow man; and believe that public policy should be based on science and rationality.

Riverside and Landowners Protection Coalition, Inc. (Boerne, TX) represents Texas citizens who own and operate ranches and farms. The Coalition is committed to educating the general public about the importance of respecting constitutional guarantees of the right to own and make reasonable use of private property. They also work with Texas legislators and state agencies to further protect these rights.

Rural Landowners Mutual Assistance Association (Davisville, MO) is an organization of landowners in the Missouri Ozarks region who are opposed to the intrusion of federal and state agencies on their constitutional property rights through the application of rules and regulations.

Stop Taking Our Property (Chesterton, IN) is comprised of 300 farm families who live along the Salt Creek and Little Calumet Rivers in Porter County, Indiana. These families have been adversely affected for years by applications of Section 404 of the Clean Water Act. Members of STOP believe that government should be bound by constitutional protections of private property when it regulates land use.

Unified Sportsmen of Pennsylvania (Harrisburg, PA) is a statewide, grassroots organization dedicated to the promotion of safe and sensible hunting, fishing, trapping, and shooting sports. It is active in state government and supports a balanced approach to wildlife management taking both the needs of animals and humans into consideration.

Western Mining Council (Los Angeles, CA) seeks to protect the property interests and constitutional rights of small business miners. WMC strongly supports reversing the trend of government taking private property without just compensation.

Western Traditions Coalition (Denver, CO) is dedicated to preserving the rights and heritage of citizens who believe in the wise use of animals for human benefit. WTC endorses the philosophy of ownership and protection of private propert, and that the multiple use of private lands provides a balanced economic and ecologic benefit for everyone.

Winning America's Rights (Reno, NV) is an umbrella organization that acts as a sounding board for issues and ideas affecting federal legislation. The goal of the organization is to raise public awareness of issues like property rights, overregulation, and unfunded federal mandates.

Defenders of Property Rights (Washington, DC) is the nation's only legal defense foundation devoted exclusively to protecting private property rights. Its mission is to protect rights considered essential by the framers of the United States Constitution and to promote a better understanding of the integral relationship between private property rights and individual rights and liberties. Defenders engages in litigation across the nation affecting the public interest and the private property rights of its membership. Defenders has devoted a significant portion of its resources to the issue of regulatory takings and has participated in *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992), *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) and *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, No. 94-859 (U.S. argued April 17, 1995) when these cases were before this Court.

SUMMARY OF ARGUMENT

This case presents a classic example of a federal regulatory program operating wholly outside the demands of the Constitution and as a result often destroying the historic and productive uses of private property. The facts of this case tell a compelling story of hardship and inequities foisted upon an individual property owner, the Petitioner. The larger picture is of countless individual property owners all across the country in a variety of contexts being singled out to bear the cost of achieving a wetland policy requiring the setting aside of millions of acres of private land as wetland reserves, often without payment of compensation to the property owner.

What makes this case particularly egregious is that the use of the property engaged in by the Petitioner and now forbidden by the Army Corps of Engineers (Army Corps) is an activity that Congress expressly exempted from regulation in the Clean Water Act, Section 404(f). Moreover, the land delineated as wetland by the government has been historically used, since at least the 1930's by the Brace family, for pasture and crop production. The Petitioner purchased the farmland from his father in 1975 with the intention of continuing the historic, productive use of that land and keeping the farming operation within the Brace family. When he purchased the property, the Petitioner was aware that the existing drainage system, which integrated the now-regulated thirty-acre parcel with other portions of the farm, needed upgrading. Moreover, due to the clogged drainage system, the regulated parcel was in poor condition and thus by then only partially utilized for crop production.

So in 1976 and 1977, Petitioner cleared clogged drains and replaced old and broken tiling in order to make the drainage system fully functional for the entire farm. The United States Agricultural Stabilization and Conservation

Service (ASCS) drew up the original plan for the drainage system and Petitioner continued to work closely with that agency for the next eight years, from 1977 to 1985. In 1986 and 1987, the Petitioner continued improvements to the drainage system, cleared the parcel of existing vegetation and prepared it for crop production. In 1987 and 1988, both the Environmental Protection Agency (EPA) and the Army Corps ordered the Petitioner to cease all activity and to allow indigenous vegetation to grow on the parcel, arguing that the activity he was conducting on his property was beyond the scope of "normal farming activity" allowed under Section 404(f) of the Clean Water Act.

Specifically, the Petitioner was told that he can no longer grow crops on the thirty acres which his family has farmed for decades. Nor can he continue to maintain the decades-old drainage system which services the entire 137-acre farm. As a result, the Petitioner's farming operations are jeopardized.

The court below clearly erred when it concluded that the Petitioner's farming activities were outside the scope of Section 404(f). In so ruling, the court below patently violated the language of the provision which on its face exempts "normal farming activity." Applied elsewhere, the ruling below could result in the regulatory shutting down of millions of productive and historic uses of agricultural property. All across the United States there are farmers, just like the Petitioner in this case, who are making reasonable, investment-backed decisions regarding the use of their land in reliance on Section 404(f) which purports to exempt "normal farming activity." Destruction of these investment-backed expectations directly implicates the duty of the government to compensate the property owner. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978).

Therefore, it is clear that the court below did not consider the Fifth Amendment ramifications of its decision which

could potentially require the federal government to compensate thousands of similarly situated farmers across the United States. *See, e.g., Florida Rock Indus., Inc. v. United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied,* 115 S. Ct. 898 (1995)(government to compensate property owner for the denial of wetlands permit to mine limestone) and *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed. Cir. 1994)(government to compensate property owner for the denial of a wetlands permit to develop property).

Accordingly, this Court should grant the Petition requested in this case and reverse the decision of the court below as being inconsistent with the intent of Congress in adopting the Section 404(f) agriculture exemption and with the Fifth Amendment which requires that property owners be compensated for the taking of their property.

ARGUMENT

I. THIS CASE INVOLVES AN IMPORTANT CONSTITUTIONAL QUESTION THAT SHOULD BE RESOLVED BY THIS COURT — WHETHER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT REQUIRES THAT SECTION 404(f) OF THE CLEAN WATER ACT BE INTERPRETED AND ENFORCED IN A MANNER THAT DOES NOT PROHIBIT NORMAL ACTIVITIES BASIC TO THE BENEFICIAL AND PRODUCTIVE USES OF PROPERTY AS PROTECTED BY THE CONSTITUTION.

The property rights protections of the Fifth Amendment include the rights "to possess, use & dispose" of private

property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Where government attempts to prohibit normal, well-established uses of private property, without providing compensation to the property owner, it risks running afoul of these important constitutional guarantees. In *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901 (1992), this Court held that regulatory prohibitions of such ordinary uses as farming must be considered in the context of the historic use of the property and surrounding area, stating that "the fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . . ." *See Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). Farming in general is a common and historic use of private property, and is specifically a historic use of the regulated land at issue in this case, and as such, that use cannot be infringed or destroyed by government with impunity. *See Lucas*, 112 S. Ct. 2886 (1992). Nevertheless, the Respondent interpreted its authority to regulate the use of private property under Section 404 of the Clean Water Act in blatant disregard of the property owner's constitutional right to continue the farming operations in place for decades.

In applying a twisted reading of the phrase "normal farming activity," the court below has sanctioned the Petitioner's loss of all right to make reasonable, beneficial, and productive use of his property as guaranteed by the Fifth Amendment.[1] Petitioner cannot utilize the drainage system

[1] It should be further noted that the interpretation by the court below of Section 404(f) makes criminal activity out of the only economically viable use of the Petitioner's property and, likewise, of thousands of other farmers similarly situated. *See* Roger Marzulla, *Presumed Guilty: Wetlands Criminal Prosecutions, in* Farmers, Ranchers and Environmental Law, 39-76 (Roger Clegg ed., 1995). Mr. Brace now faces the possibility of hundreds of thousands of dollars in penalties, which may be assessed upon remand to the district court.

installed by his grandfather which he painstakingly refurbished and maintained over a period of more than ten years and which is necessary for crop production on the parcel and is integrated with the entire farm. Without proper drainage, the property cannot be used for agricultural production — the sole historic use of the property.

As Section 404(f) reflects, Congress never intended to interrupt the nation's agricultural production when it adopted the Clean Water Act. The language of the provision could not be clearer: "normal farming activity" is allowable under the Act.[2] Under this exemption, a farmer should be allowed to continue farming his property regardless of the hydrology, soil characteristics and vegetation of the property and the potential that in fact the land could be designated as "wetland." Clearly Congress recognized the importance of the agricultural industry to our nation's well-being. Farmers are responsible for the production of food and fiber for the citizens of this country. Production agriculture (the output of goods and services by farms and ranches) totaled $188 billion in 1993, approximately three percent of the gross domestic product. Economic Research Serv., U.S. Dep't of Agric., Pub. No. ECIFS-13-1, Economic Indicators of the Farm Sector, National Financial Summary (1993). From farm to table, farm products in 1993 were responsible for sixteen percent of the gross domestic product and twenty-two million jobs, eighteen percent of the workforce. U.S. Census Bureau, Statistical Abstract of the United States, Industries of the Total Food and Fiber System (115th ed. 1995).

Over the life of the wetlands regulatory program, Congress has often reiterated its intent that the Act be construed in a manner that would not prohibit America's farmers from

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[2] The exemptions applicable to the present case, which preclude the necessity of asking permission of the government to conduct enumerated activities, include "normal farming" and the "maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A),(C).

earning a living. [3]

One vital aspect of farm production is proper drainage of agricultural land, which is allowed as part of the agriculture exemption of the Clean Water Act. Drainage and irrigation are an integral part of a long range program to balance production with conservation of resources so that the land is productive for generations to come. The decision of the court below, which disallows drainage of the Petitioner's property, flies in the face of the clear congressional scheme by separating out this inseparable aspect of farming.

In the same way that Congress did not intend that farmers be precluded from engaging in normal agricultural activities, surely the framers of our Constitution did not intend that there be wholesale destruction of beneficial and productive uses of land. When such uses of private property are prohibited, the fundamental principle underlying the protection of property rights is nullified merely to realize some momentary regulatory goal. Regulatory programs that result in the wholesale elimination of private property rights, no matter how laudable, cannot be countenanced. As Justice Marshall observed in the landmark decision of this Court in *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 439 (1982): "[T]he government does not have unlimited power to redefine property rights."

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[3] For example, Representative Breaux stated that:

> it is important that our farmers, many of whom have never previously been affected by the complex regulatory program under Section 404, be well-informed and be assured that continuing their normal farming practices will not require new burdens or subject them to potential violations of federal law

136 Cong. Rec. S5643, 5648 (daily ed. Apr. 18, 1990) (statement of Rep. Breaux).

II. THIS COURT MUST ALSO DECIDE WHETHER THE GOVERNMENT MAY UNILATERALLY EXTINGUISH THE REASONABLE INVESTMENT-BACKED EXPECTATIONS OF A WHOLE CLASS OF PROPERTY OWNERS.

This Court has long recognized that frustration of distinct, investment-backed expectations by government regulation is a critical component of the regulatory takings compensation analysis. In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978), Justice Brennan stated that "*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" In *Penn Central*, Justice Brennan further upheld the concept of interference with investment-backed expectations as a critical factor in the takings analysis. This focus on the reasonable investment-backed expectations of the property owner has later determined the outcome in several of this Court's leading takings cases.

In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), for example, the plaintiff alleged that EPA's public disclosure of confidential material gave away valuable trade secrets. The information had been submitted by Monsanto to EPA in order to register a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In assessing whether plaintiff had an expectation that this information would be kept secret, the Court wrote that "[a] 'reasonable investment-backed expectation' must be more than a 'unilateral expectation or an abstract need.'" *Id.* at 1005-06 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). Under this definition, this Court found that between

the years 1972 and 1978, "the Federal Government had explicitly guaranteed to Monsanto and other registration applicants an extensive measure of confidentiality and exclusive use. This explicit governmental guarantee formed the basis of a reasonable investment-backed expectation." *Id.* at 1011. On these grounds, the *Monsanto* Court found a taking.

Government interference with investment-backed expectations also resulted in a taking in *United Nuclear Corp. v. United States*, 912 F.2d 1432 (Fed. Cir. 1990). Plaintiffs there signed a lease to mine uranium on the Navajo Indian reservation and then spent more than $5 million on exploration. This led to the knowledge that a sizable amount of uranium lay in the leased area. United then applied for the necessary permits. Although United met the technical requirements, the United States withheld the permits to mine on the grounds that the Navajo tribe had not approved the mining plan. The permit delay caused the lease to lapse and the Navajos kept all lease bonuses, rents and royalties.

The federal circuit found that the government's new policy of allowing the tribe to veto ratified leases "seriously interfered with United's investment-backed expectations by destroying them." *Id.* at 1437. The court recognized that expectations may be frustrated by future regulations but that:

> The fact that United agreed that the leases would be subject to future regulations does not indicate that United fairly can be said to have anticipated that the Secretary would apply a new policy requiring tribal approval of mining plans to leases entered into almost six years earlier, in reliance on which United had expended some $5 million.

Id. at 1436. *See also Yancey v. United States*, 915 F.2d 1534, 1539-40 (Fed. Cir. 1990)(government-mandated quarantine of turkeys interfered with plaintiff's investment-backed expectations to sell the flock out of state).

The federal circuit has also held that destruction of reasonable investment-backed expectations in the context of wetlands regulations can violate the Fifth Amendment. In *Creppel v. United States*, 41 F.3d 627 (Fed. Cir. 1994), landowners designed and began a land reclamation project under the approval of the Army Corps of Engineers. The EPA then modified the plan, which "eliminated the landowners' expectation of land reclamation, causing the property's value to plummet." *Id.* at 632. As a result, the court concluded that a taking had occurred. In another recent case, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994), property owners were awarded compensation for the taking of their property, which became subject to wetlands regulation after they purchased it for development. Assessing the expectations of the property owners, the court pointed out:

> It is important to note that Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect. Furthermore, the state did not include in its original conditions for development of the property any restrictions on the filling of the 12.5 acres at issue here. The fill restrictions did not arise until long after the development project was undertaken.

Id. at 1183.

In the instant case, Petitioner had likewise reasonably relied on the government's explicitly exempting from the Section 404 permitting program "normal farming activities" including "drainage" of his farm land. Because of the clear wording of Section 404(f) and the government's consistent interpretation of that provision and approval of his activities, Brace had no reason to anticipate that the federal government would suddenly render his activities unlawful, thereby wiping out his long-term and costly expenditures. However, not only has the decision of the court below frustrated Petitioner's reasonable investment-backed expectations, applied elsewhere, the decision may potentially destroy the expectations of farmers all across the country. In short, the implications of the decision below are staggering.

And while this Court has often stated that the Fifth Amendment does not bar the government from taking private property rights, *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990), surely the framers of our Constitution could not have envisioned that the government would engage with impunity in wholesale destruction of private property rights resulting in the potential payment of millions of dollars as compensation for the takings. Indeed, the Fifth Amendment, unless it is to forever "be relegated to the status of a poor relation" vis-a-vis other constitutionally-protected rights, *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2313 (1994), must at a minimum, require the government to consider the property rights at stake before it adopts a policy involving a sweeping disregard of those rights.

CONCLUSION

In order to ensure that the Respondent's interpretation of Section 404(f) not be applied in a manner which continues to "redefine" private property rights out of existence, it is important that this regulatory provision be construed in a manner consistent with the Fifth Amendment. Accordingly, these *amici* urge this Court to grant the requested Petition and issue the Writ of *Certiorari*.

Respectfully submitted,

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June 6, 1995